No. 16169

United States Court of Appeals

For the Ninth Circuit

MOORE-MCCORMACK LINES, INC., a Delaware corporation,
Appellant,

vs.

LOUIS RUSSAK, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

RESPONDENT'S BRIEF

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United States Court of Appeals

For the Ninth Circuit

Moore-McCormack Lines, Inc., a Delaware corporation,	*Appellant,*	No. 16169
vs.		
Louis Russak,	*Appellee.*	

Appeal from the United States District Court for The Western District of Washington, Northern Division

RESPONDENT'S BRIEF

STATEMENT OF JURISDICTION

Respondent accepts and adopts appellant's statement of jurisdiction.

STATEMENT OF THE CASE

The facts in this case are very simple. Action was brought by the respondent to recover damages sustained when he was a passenger on the appellant's vessel. The injury occurred when the respondent slipped on the dance floor in the main salon, due to the presence of residue of crushed grapes.

The trial court found as a fact that there was the residue of fruit on the dance floor and that reasonable opportunity existed for the appellant to have noticed the condition and to have cleaned it up (Tr. 11, Findings of Fact 2).

The only witnesses testifying to the facts were the respondent, Russak, his wife, and the ship's doctor, Dr. Robert B. Kayser. Respondent was participating in a

carnival performance put on by the vessel for its passengers. Before respondent's actual participation, he observed one of the fellow passengers who was also going to perform and who was described as wearing a "Carmen Miranda" costume, carrying fruit and giving and throwing fruit including grapes to the fellow passengers seated around the dance floor (Tr. 27, 38, 52). This occurred about twenty to twenty-five minutes before the respondent and his wife went onto the dance floor to participate in the dancing (Tr. 27, 53). Respondent testified that he had just started to dance when his foot slipped and he felt a sharp pain. He managed to keep himself from falling to the floor. He testified that, "I could see right next to my foot a little bit of moisture. It looked like a few grapes, skin of a grape" (Tr. 28).

Respondent Russak immediately went over to a chair and sat down and removed his shoe. The cruise director came over and the respondent explained what had occurred, that there was some fruit on the floor (Tr. 29) and the cruise director went over and looked at the spot (Tr. 55). Respondent then reported to the ship's doctor, telling him what caused the fall (Tr. 30), and the doctor made a report of what occurred (Tr. 35). It was not believed at first that the respondent's injuries were serious. It was later discovered that the respondent had a fractured bone in his foot (Tr. 32) which received treatment throughout the remainder of the voyage and after the arrival of the vessel at Buenos Aires (Tr. 33, 34).

Dr. Robert B. Kayser, the ship's physician, testified on behalf of appellant. He was present at the festivities

but did not see the accident or any accident (Tr. 58). He was taking pictures (Tr. 65) and did not recall even seeing Mr. and Mrs. Russak as contestants (Tr. 66), nor did he recall the so-called "Carmen Miranda" act (Tr. 70), although he did remember one of the passengers in the costume of Nero and his daughter who carried fruit (Tr. 70). He further testified that in addition to himself at these festivities there was present from the vessel's staff the cruise director, the cruise directress, the lounge steward, probably a second steward, and some of the executive officers of the vessel (Tr. 58). It is the duty of the lounge stewards to be on the job while passengers are in the main salon (Tr. 63). The doctor testified that "When anything is spilled on the dance floor, such as water, which frequently happens, et cetera, there is a lounge steward there to clean it up immediately" (Tr. 64).

Dr. Kayser corroborated that he asked the respondent the circumstances of the accident (Tr. 72). Under questioning by the court he had a vague recollection of a statement about grapes (Tr. 74). He testified that a statement was taken from the injured person at the earliest feasible time (Tr. 75) and that a report was made. He had occasion to review the records immediately prior to his testifying (Tr. 71). The records, however, were not produced in court, as was commented upon by the trial court in its oral opinion.

At the close of the case the experienced trial court carefully reviewed the evidence in announcing his decision (Tr. 77-81). While admitting that the evidence was far from being clear and definite as all parties

might wish, such weakness was inherent in this type of case. The court found that there was a foreign substance on the floor similar to grapes. The court affirmatively found (Tr. 78) that the Russaks were objective and frank in their testimony. The court also commented upon the fact that the evidence showed that a report was made about the incident at the time, which report was not produced by the defendant (Tr. 78).

The court then carefully analyzed the evidence relating to notice of the condition by appellant and its opportunity in the exercise of reasonable care to clean up the condition. The court applied the rule that the appellant must exercise the highest degree of care for the safety of passengers to remove the material from the floor (Tr. 79). It commented on the fact that the period of time in which the appellant should have seen and removed the material should be brief in view of the crowded party on the dance floor with a lot of people milling around and performing. A very short period of time would be long enough for one or another of the several employees of the appellant who were in the hall to see and remove the foreign substance from the small area of floor space. The court felt that these employees would have to watch conditions pretty closely. Particularly if some girl was throwing fruit around among the guests, which the court found was a fact (Tr. 80).

The court found that the respondent had suffered injury as the result of the lack of care on the part of the appellant and awarded damages to respondent. Appropriate findings of fact and judgment were thereafter entered.

ARGUMENT IN SUPPORT OF THE JUDGMENT

Appellant challenges the sufficiency of the evidence to support the court's findings of fact II (Tr. 11). The court found that the appellant had failed to exercise the highest degree of care consistent with the operation of the vessel in that it permitted spilled fruit or residue to remain on the floor of the main lounge after a reasonable opportunity to remove the same. That as a direct and proximate result of this negligence the respondent sustained the injury.

We doubt if any rule of review has been more consistently followed and applied than the part of Rule 52(a) of the Federal Rules of Civil Procedure that ". . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

This finding must stand unless clearly erroneous. Appellant does not point out any evidence in the record which challenges the finding. We call the court's attention to the direct testimony of the respondent, Russak, that just after he started to dance his foot slipped and he felt a sharp pain and he kept himself from falling to the floor. He saw "Right next to my foot a little bit of moisture. It looked like a few grapes, skin of a grape" (Tr. 28). Russak made a resport of the circumstances to the appellant. Bearing in mind the admonition contained in Rule 52(a) that due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses, it is thus apparent that there is substantial evidence to support the court's findings that there was a residue of fruit on the floor.

In addition, there are some strong inferences to be made from the record in support of the court's findings. Russak testified that a report was made concerning this condition. This was corroborated by the appellant's witness, Dr. Kayser (Tr. 75), and this is also in accord with the usual experience in matters of this nature. The appellant failed to produce this report.

The failure to produce this report and the absence of any explanation to why it was not produced leaves a strong inference that if produced it would have corroborated the testimony of the respondent. (20 Am. Jur. 188).

Appellant's principal challenge is directed to the finding that it had constructive or actual notice of the condition with a reasonable opportunity to clean it up. To answer this challenge, it is only necessary to refer to the court's oral decision and the reference to the testimony that one of the female passengers was throwing fruit to the other passengers on the dance floor and which this court found as a fact (Tr. 80), and that this occurred twenty to twenty-five minutes prior to the accident. At that time there were at least four of appellant's employees present and participating in the affair who saw or should have seen what was going on. Among these employees were the lounge steward and probably his assistant (Tr. 58) who were specifically charged with the duty of cleaning up the floor (Tr. 62, 63), a hazard which was frequently anticipated (Tr. 64).

In view of the finding of the throwing of fruit about the floor twenty minutes or so prior to the accident, the crowded dance floor, the presence of appellant's em-

ployees charged with the duty of keeping the floor clean, an inference must follow from these facts that the appellant had a reasonable opportunity to clean up the floor. This inference is particularly strong in this case when we must consider that the rule of care which applies here is the highest degree of care consistent with the practical operation of the vessel.

Certainly there was nothing impractical or difficult in checking the condition of the floor when the "Carmen Miranda" act was finished. Considering the number of people involved and the nature of the activity, common sense indicates no other course.

Actually, the only conflict of evidence on the issue of the time element relating to the opportunity to clean up, exists in the testimony of the ship's doctor. This testimony was that he did not recall the Carmen Miranda incident, but did recall Nero and his daughter who carried fruit (Tr. 70). Other than this, the testimony concerning this incident stands undisputed. The trial court made a finding that the fruit throwing incident did in fact occur.

This reviewing court will not resolve a conflict in the testimony of witnesses. This court has emphasized the importance of the conclusions of the trial judge which derived from his opportunity to pass upon the credibility of witnesses.

> *Grace Bros. v. The Commissioner of Internal Revenue,* 173 F.(2d) 170 (CCA9).

On appeal, that view of the evidence must be taken which is most favorable to the prevailing party, and if when so viewed the findings are supported by sub-

stantial competent evidence, the trial court findings must be sustained.

> *Federal Savings & Loan Association v. The First National Bank,* 164 F.(2d) 929 (CCA8).

Applying these views reinforces the respondent's position. There is in this record substantial evidence to support the court's findings.

ANSWER TO THE ARGUMENT OF APPELLANT

Appellant specifies as error the court's finding that there was a fruit residue on the floor and that there was actual or constructive notice of this condition (App. Br. 9). Appellant makes no argument however in support of the specification that there was no evidence to support the finding that there was a fruit residue on the floor. Its principal argument is on the issue of notice.

We have no quarrel with the statement of the rule, that as far as passengers are concerned, there is no liability on the part of the ship owner for a passenger's injury due to slipping on a foreign substance without proof of actual or constructive notice of the existence of this substance. It would serve no purpose, therefore, to discuss the various cases cited by the appellant in support of this proposition (App. Br. 12, 17).

Appellant's argument to establish that there was no constructive or actual notice of the fruit residue on the dance floor ignores the practicalities of the situation. Appellant's labored syllogism is based upon technical interpretation of isolated bits of testimony. Appellant does not deny that there was a "Carmen Miranda" tossing fruit to the passengers. While commenting that

she was walking all the way around the dance floor appellant conveniently ignores that portion of the testimony that "Carmen Miranda" was on the floor throwing fruit to the passengers (Tr. 27) and that there were lots of children and adults on the dance floor. Appellant's conclusion as to the exact position of the respondent in the middle of the floor is based upon the isolated statement (Tr. 41) that the slip occurred in the middle of the floor and from this statement argues that this was the exact mathematical point where it occurred. This testimony was brought out in connection with questions concerning a rough diagram drawn by counsel, where the general area of the dancing was indicated (Tr. 42) and that there were other couples on the floor at the time (Tr. 43). After setting up this false premise, appellant urges that the spillage must have been transported twelve feet from the edge of the dance floor (App. Br. 19) and there was no evidence of how it was transported to the center, therefore, there was no evidence of notice. Appellant ignores the testimony that respondent moved around in the dance (Tr. 41). Appellant's argument necessarily assumes that grapes, once dropped, will remain exactly at the point where dropped.

Appellant's strained attempt to describe the foreign substance as "moisture" (App. Br. 18) ignores the common meaning of language. The testimony upon which it bases this effort is "I could see right next to my foot there was a little bit of moisture. It looked like a few grapes, skin of a grape" (Tr. 28). There can be no question as to what was actually meant by this state-

ment. The trial court knew what was meant and so found.

It is also significant that no comment is made by appellant anywhere in its brief of the presence of the cruise director, the assistant cruise directress, two lounge stewards, the ship's doctor, and several of the ship's executive officers during this period (Tr. 58). The presence of these members of the vessel's crew has a direct relationship to the question of notice. Ignoring them in the brief does not eliminate this testimony nor absolve the appellant of its responsibility for their failure to exercise due care.

The ultimate fact of negligence is an inference to be drawn from all of the circumstances in the case, but evidentiary facts must be established that would warrant a reasonable person to infer negligence (38 Am. Jur. 1031). What are the evidentiary facts which were established? "Carmen Miranda" tossing grapes to the dance floor to passengers seated or standing around the floor. Twenty or twenty-five minutes later grapes, or the residue of grapes, were noticed on the same dance floor. Reasonable men would infer that they were dropped at the time "Carmen Miranda" tossed them about.

The actual dropping of the grapes need not be established by direct evidence. This is an inference from the facts. This is similar to proof of proximate cause which need not be established by testimony of eye witnesses nor by direct or positive evidence, but may be proved by circumstantial evidence. It may be determined by the circumstances of the case. *Johnson, administrator,*

v. Griffith SS Co., 150 F.(2d) 224 (CCA9); 38 Am. Jur. 1033.

It would be of very little assistance to this court to analyze all of the cases cited by the appellant. As stated above, respondent has no quarrel with the rule of law that notice must be found to establish liability. In applying this rule, the cases cited by appellant relate to factual situations. These factual situations can be distinguished from the facts of the case at bar.

Old South Lines, Inc. v. McQuiston, 92 F.(2d) 439 (CCA5) (App. Br. 20) has very little parallel with the facts to the case at bar. In that case a period of nine hours elapsed between the time the plaintiff saw a person eating a banana at the front of the bus and the time the plaintiff was injured in back of the bus. By reason of the distance involved and the time element, the court in that case stated that it would require an inference that another passenger had thrown the discarded banana peel (App. Br. 22).

Appellant cites *J. C. Penney Co. v. Norris,* 250 F.(2d) 385 (CCA5) (App. Br. 23) which is no authority upon which respondent's factual situation can be challenged. In that case there was no evidence whatever that the bottle cap which caused the fall was noted prior to the accident.

As there was evidence in this case of a definite period of time upon which to base constructive notice, i.e., the action of "Carmen Miranda," appellant's citation of *Sattler v. Great A & P Tea Co.* (D.C. La.) 18 F.R.D. 277 (App. Br. 25) discussing the attempt to fix time by the deteriorated condition of the foreign substance has no application.

Nor are appellant's cases (*DeBaca v. Kahn* (N.M.) 161 P.(2d) 630; *Kalinoski v. YWCA* (Wash.) 135 P. (2d) 852; *Harpke v. Lankershim Estates* (Calif.) 229 P.(2d) 103) that the fall itself was offered as evidence of the slippery condition in point, as there is evidence in this case of the substance which created the dangerous condition.

Allen v. Matson Navigation Co., 255 F.(2d) 273, decided by this court and cited by the defendant (App. Br. 28) contains a discussion of a duty of a vessel toward passengers with relation to slippery conditions in areas used by passengers. There was involved a suit by a passenger for injuries sustained by a fall on the stair landing on the SS "LURLINE" while docking at San Francisco. While walking across the landing, Mrs. Allen's feet slipped from under her and she fell flat on her back. She alleged that the landing was excessively slippery and unsafe. Another passenger testified (P. 275) "Surface quite slippery and had felt that way other times." The plaintiff testified, "It was more or less shiny and slippery" on this and previous mornings.

The stairs were regularly mopped with water containing a glass cleaner. The jury found for the plaintiff upon which the trial court entered judgment *n.o.v.* which was appealed to this court. This court reversed and directed the entry of the judgment on the verdict.

During the course of the discussion this court stated (Page 277):

> "Plainly enough, as a carrier it was the duty of the defendant here to exercise extraordinary vigilance and the highest skill to secure the safe

conveyance of the passenger. As stated in *Pennsylvania Co. v. Roy,* 102 U.S. 451, 26 L.ed. 141, 'For the slightest negligence or fault in this regard from which injury results to the passenger, the carrier is liable in damages.' ''

The court also discusses the ability of a person to give an opinion as to the slippery surface only by virtue of having walked upon it. It is also interesting to note that this court states:

> ''The evidence does not disclose why the floor was slippery and it was not incumbent upon the plaintiffs to show the reason for its slipperiness * * * .'' (Page 280)

In general, appellant's argument is based upon the criticism that the evidence in support of the judgment was not definite enough. The best answer to this argument is the opinion of the experienced trial judge (Tr. 77, 78):

> ''The Court: Of course, the evidence is far from as satisfactory, clear, and definite as all of us, the plaintiff, the defense, and the Court might wish. This is a weakness, if you want to call it that, inherent in a case of this kind. I suppose that I have handled hundreds of them and I have tried dozens of them and feel some familiarity with the practicalities of such a case.
>
> ''Russak and his wife were at the ship fiesta having a good time. That is what they paid their cruise passage money for. The party was arranged as a gala affair with the idea that people could be carefree and have fun, frolic about, and even do the kazotska dance. Suddenly an incident like this happens, and, of course, they happen not infrequently. The person injured in such an incident

> isn't going to stop and minutely examine conditions and get photographs thereof. He is going to look down to see what caused his injury, and seeing something there, is going to look at it. But his ankle is paining him, and he goes over and gets out of the way of other performers and hopes that by the next round he will be able to answer the bell. It is a perfectly natural, normal reaction."

Respondent does not deem it necessary to discuss the alleged hearsay statements of the cruise director which have been specified as an error by appellant as it makes no contention in its argument (App. Br. 30) that these statements had any effect on the court's decision, or were considered by the court.

CONCLUSION

This case was tried to the court. Upon conflicting testimony the court found that there was a slippery substance on the dance floor and that facts were established from which it could be reasonably inferred that this substance was on the dance floor approximately twenty minutes before the accident. The court further found from the evidence, that under the circumstances existing at the time, the presence of those charged with the duty of cleaning up any such material which may have been spilled, that the appellant had or should have had notice of the presence of this substance. It further found that in the exercise of that degree of care owed by the appellant as a carrier to the respondent as a passenger that this substance should have been removed prior to the accident. The failure to remove this was a proximate cause of respondent's injury.

The findings of the trial court are not clearly erroneous and, therefore, the judgment should be affirmed.

Respectfully submitted,

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